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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SPECTRAMED, INC.,
Petitioner,

vs.

BAXTER HEALTHCARE CORPORATION
and UTAH MEDICAL PRODUCTS, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court below, the Court of Appeals for the Federal Circuit, err in concluding that it could (a) refuse to give effect to the declaration of a mistrial because the District Court judge ruled on post-trial motions brought by the parties and (b) use this refusal to recognize the mistrial as a basis for resurrecting non-dispositive answers to jury interrogatories and then use those answers as a basis for reversing a judgment as a matter of law granted by the District Court?

LIST OF PARTIES TO THE PROCEEDING PURSUANT TO RULES 14.1(b) AND 29.1

Petitioner Spectramed, Inc. was defendant-appellee-cross-appellant below; Respondents Baxter Healthcare Corp. and Utah Medical Products, Inc. were plaintiffs-appellants below.

Pursuant to Supreme Court Rule 14.1(b), Petitioner Spectramed, Inc. certifies that the names of all parties to this proceeding appear in the caption of this Petition for Writ of Certiorari.

Pursuant to Supreme Court Rule 29.1, Petitioner notes that Spectramed, Inc. is a wholly owned subsidiary of BOC Healthcare Inc. which is, in turn, a wholly owned subsidiary of BOC Group Inc., a Delaware corporation, which is a wholly subsidiary of BOC, Inc., which is a wholly owned subsidiary of BOC Group Inc., a Nevada corporation, which is a wholly owned subsidiary of BOC Holdings, which is a wholly owned subsidiary of BOC PLC, a London company listed on the London Stock Exchange. BOC PLC has issued shares to the public. There are no other subsidiaries that have issued shares to the public.

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IN THE
SUPREME COURT OF THE UNITED STATES
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SPECTRAMED, INC.,
Petitioner,
vs.
BAXTER HEALTHCARE CORPORATION
and UTAH MEDICAL PRODUCTS, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner Spectramed, Inc. ("Spectramed") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in the above-captioned case on March 17, 1995.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Federal Circuit is reported at 49 F.3d 1575 and is reprinted in the Appendix hereto at App. A. The Judgment of the United States District Court for the Central District of California is unreported and is reprinted at App. B. The pre-Judgment Orders and statements on the record of the District Court are unreported and are reprinted at App. C, App. D, App. E and App. F.

STATEMENT OF JURISDICTION

Respondents Baxter Healthcare Corporation and Utah Medical Products, Inc. initiated this case by filing a Complaint for patent infringement against Petitioner Spectramed, Inc. in the United States District Court for the Central District of California on February 23, 1989. Jurisdiction was based on 28 U.S.C. § 1331 and § 1338. On February 19, 1993, after trial to a jury and submission of special interrogatories to the jury, the District Court declared a mistrial because the jury was unable to reach unanimity on its answers to the jury interrogatories in a manner dispositive of the case (some, but not all, of the interrogatories were unanimously answered). On March 2, 1993, the District Court granted Respondent's Motion for Judgment as Matter of Law (JMOL) that the patent-in-suit was not infringed. On March 3, 1993, the District Court entered judgment to this effect.

Respondents appealed and Petitioner cross-appealed to the Court of Appeals for the Federal Circuit and, on March 17, 1995, the Court of Appeals reversed the District Court's grant of JMOL of non-infringement and, in spite of the fact that the District Court had declared a mistrial, gave effect to the answers to jury interrogatories on the issue of infringement as its basis for doing so. The jurisdiction of this Court to review the judgment below is based on 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondents Baxter Healthcare Corp. and Utah Medical Products, Inc. ("Baxter") filed suit against Petitioner Spectramed, Inc. ("Spectramed") on February 23, 1989 in the United States District Court for the Central District of California. The complaint alleged patent infringement in violation of 35 U.S.C. § 271. The action was tried to a jury in a trial which began on September 29, 1992 and concluded on February 19, 1993 when, because the jury was unable to reach unanimity on a sufficient number of the interrogatories submitted to it under Rule 49(a) of the Federal Rules of Civil Procedure to dispose of the case, the District Court declared a mistrial (App. D). Among the answers to the jury interrogatories were answers favorable to Baxter on the issue of infringement. At that time, Petitioner renewed its previously asserted Motions for JMOL under Rule 50 of the Federal Rules of Civil Procedure.

Thereafter, at a status conference on February 23, 1993, the District Court, after noting that, previously, "the mistrial was declared", discussed further proceedings with counsel. At a subsequent hearing on March 2, 1993, the District Court Judge once again noted that she had "declared the mistrial" and proceeded to rule on the motions brought by the parties.

The rulings on Petitioner's Motions for JMOL, which granted some and denied others, were case-dispositive on the issue of non-infringement of the patent-in-suit which was decided in favor of Petitioner.

On the same day, March 2, 1993, the District Court Judge signed a judgment of non-infringement of the patent which judgment also contained some findings based on some, but not all, of the jury interrogatories which were unanimously answered on sub-issues relating to patent validity (but which were not case-dispositive on the issue of validity because the jury could not reach unanimity with regard to validity or invalidity on certain validity issues such as obviousness over the prior art under 35 U.S.C. § 103).

Respondents appealed and Petitioner cross-appealed to the Court of Appeals for the Federal Circuit. On March 17, 1995, the Court of Appeals reversed the District Court's grant of JMOL of non-infringement and, in spite of the fact that the District Court had declared a mistrial thereby nullifying the non-dispositive answers to the jury interrogatories including the answers going to infringement, gave effect to the answers given by the jury on the issue of infringement as its basis for doing so.

The Appellate Court in so doing, held that because "the judge disposed of the case by ruling on the parties numerous post-verdict motions", her ruling that "there is a legal necessity to declare a mistrial with respect to this matter" was "merely a statement of intent post-trial of the District Court, which, on more deliberate consideration, was not acted upon." (App. A, pp 15)

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH TWO CENTURIES OF UNITED STATES JURISPRUDENCE ON THE EFFECT OF POST-TRIAL MOTIONS ON A PREVIOUSLY DECLARED MISTRIAL

This Court should grant certiorari to prevent the use by an appellate court of rulings by a district court on post-trial motions in cases in which a mistrial has been declared as a basis for refusing to give effect to the mistrial and then using answers which were rendered legally non-existent by the mistrial as a basis for reversing a grant of judgment as a matter of law.

The fact that the declaration of a mistrial has the effect of causing all trial proceedings, including partial answers to jury interrogatories, to pass out of existence is fundamental and, as stated in Black's Law Dictionary, (5th Ed. 1979), p. 903, a mistrial is:

> "An erroneous, invalid or nugatory trial . . . The judge may declare a mistrial because of some extraordinary event . . . or because of a deadlocked jury."

In the present case, the District Court declared a mistrial and, at all times, adhered to that declaration in further proceedings after trial which proceedings included ruling on Petitioner's renewed motions under Rule 50 for judgment as a matter of law (JMOL).

The Appellate Court then, in a radical departure from the uniform jurisprudence of this nation, held that because "the judge disposed of the case by ruling on the parties numerous post-verdict motions", her ruling that "there is a legal necessity to declare a mistrial with respect to this matter" was "merely a statement of intent post-trial of the District Court, which, on more deliberate consideration, was not acted upon." The effect of this appellate ruling is to hold that when a district court judge, subsequent to declaring a mistrial, grants a case-dispositive motion for JMOL (thereby eliminating the need to rule on a motion for a new trial brought in the alternative), the Appellate Court may treat the mistrial as if it did not occur and proceed to an appellate consideration of non-dispositive answers to jury interrogatories. Such action by an Appellate Court wholly improperly rearranges the procedural setting of the case and equally improperly usurps the authority of the District Court. Worse, in this case, the refusal to give effect to the mistrial was used by the Federal Circuit as the basis for reversing the JMOL granted to Petitioner.

It is the acknowledged fact that, for at least the past decade, and certainly at the present time, most patent infringement actions are tried to juries. It is also the fact that, in the great majority of these patent infringement jury trials, the case is submitted to the jury under Rule 49(a) of the Federal Rules of Civil Procedure with a set of jury interrogatories which are directed to disputed factual issues. This was done in the present case, but the jury was unable to reach unanimity on its answers to a sufficient number of interrogatories for its answers to be dispositive of the case. In light of this deadlock, the District Court judge appropriately declared a mistrial.

Typically, when a mistrial is declared, the district court proceeds to set the case for a new trial to a different jury. However, in some cases, and this is one of them, post-trial motions are brought, or renewed, seeking, among other things, judgment as a matter of law, i.e., a judgment which does not require the assistance of a jury. In the present case, Petitioner had properly brought and renewed several motions for judgment as a matter of law including a motion for JMOL that the patent was not infringed. Several weeks after declaring the mistrial, the District Court granted Petitioner's motion for JMOL of non-infringement thereby making a dispositive ruling in Petitioner's favor and eliminating the need for a new trial.

However, because of its erroneous view that the act of the District Court in ruling on post-trial motions without "mention of a mistrial (or new trial) in the final judgment" (49 F.3d 1581) caused the declaration of mistrial to become ineffective, created a situation in which:

a. The District Court, after declaring a mistrial, proceeded to dispose of the case by granting Petitioner's motion for JMOL and entered judgment of non-infringement that it had not infringed the patent-in-suit.

b. The Appellate Court then turned procedural reality upside down and held that, because the District Court had ruled on the parties' post-trial motions, it had not declared a mistrial.

c. The Appellate Court then used its erroneous refusal to give effect to the mistrial declared by the District Court as a basis, at 49 F.3d 1583, for resurrecting the answers to jury interrogatories and reversed the grant to Petitioner of JMOL as follows:

> "Given the deferential standard applied to jury verdicts, we find no basis for upsetting the jury verdict in this regard, and accordingly, we reverse the trial court's grant of JMOL of no infringement." (emphasis added).

In the present case, there was no "jury verdict". Rather, there were merely non-dispositive answers to jury interrogatories which had been caused to pass out of existence by the District Court's declaration of a mistrial. Thus, the Appellate Court's reversal of the grant of JMOL was based on something that did not exist and the Appellate Court failed to make a proper determination as to whether JMOL was properly granted because it gave a deference to a non-existent "jury verdict" (thereby undermining its statement at 49 F.3d 1583 that its conclusion was also based on a review of the evidence).

The declaration of a mistrial cannot be undone by an Appellate Court based on the subsequent acts of a District Court Judge who at all times adhered to her declaration of a mistrial. On March 2, 1993, the same day the District Court signed its Judgment, the District Court plainly recognized that it had previously "declared the mistrial" (App. F) and that it would proceed to a discussion of its tentative ruling (App. C) (which then became final)

on Petitioner's renewed motions for JMOL under Rule 50. Thus, there was never any doubt in the mind of the District Court Judge that she had declared a mistrial and it was beyond the power of the Federal Circuit panel to, in effect, vacate the mistrial.

A. The Declaration of Mistrial

On February 19, 1993 the District Court declared the mistrial as follows (App. D):

> "THE COURT: The record will show once again the presence of the jury in this matter.
>
> And at this time, I find that there is legal necessity to declare a mistrial with respect to this matter for lack of unanimity with respect to the interrogatories that we have identified." (emphasis added).

B. Adherence to Declaration of Mistrial

At a status conference a few days after the declaration of mistrial, on February 23, 1993, the District Court made reference to the fact that a mistrial had been declared as follows (App. E):

> "THE COURT: The record will show that this is a hearing in the matter entitled Baxter v. Spectramed. And the Court had after the mistrial was declared set this down for a scheduling conference." (emphasis added).

Yet again, on March 2, 1993, the same day the Court signed the Judgment (App. B), the District Judge

made it plain that there was no doubt in her mind that a mistrial had been declared (App. F):

> "[THE COURT]: Since counsel has had an opportunity to review the Court's written tentative ruling [on the motions for JMOL], it is self-evident as to what it is the Court refers. And I will first turn to defendants who -- defendant rather -- who at the time the Court declared the mistrial indicated that all of its previous motions brought under Rule 50 would be renewed." (emphasis added).

Thus, it is beyond doubt that at all times between declaration of the mistrial and signing of the Judgment, the District Court adhered to the fact that a mistrial had been declared.

C. The Appellate Court's Refusal to Give Effect to the Mistrial

However, in the face of this unequivocal record that a mistrial had been declared, the Federal Circuit decision in this case, at 49 F.3d 1581, held that the District Court's statement that "there is a legal necessity to declare a mistrial with respect to this matter . . . " was:

> " . . . merely a statement of intent post-trial of the District Court, which, on more deliberate consideration, was not acted upon." (emphasis added).

In so holding, the Federal Circuit made a ruling which is unprecedented in the jurisprudence of this country, namely, that a clear and unequivocal declaration of a

mistrial by a district court can somehow later be denied its intended effect by an Appellate Court because the District Court ruled on post-trial motions.

D. The Post-Mistrial Proceedings Cannot Alter the Fact that a Mistrial Was Declared

After declaration of the mistrial, the District Court ruled on various motions brought by the parties. Petitioner had properly brought and renewed several motions under Rule 50 for JMOL. Procedurally, these motions could have been granted prior to submission of the case to the jury as well as after submission of the case to the jury and after the declaration of a mistrial. Thus, the Court was obliged to rule on these motions and did so by granting some and denying others. The Federal Circuit, at 49 F.3d 1581, plainly concluded that the fact that the District Court ruled on these motions meant that the District Court had not really declared a mistrial in the first place -- a conclusion completely at odds with the post-mistrial conduct of the District Court and a conclusion which is a fundamental non-sequitur. As to the latter, if the declaration of a mistrial can be undone by bringing or renewing ordinary post-trial motions and thereby obliging the District Court to rule on them, no mistrial would ever take effect. However, district courts which have declared mistrials routinely go on to rule on motions brought under Rule 50 without any way undoing the mistrial, e.g., *Mulholland v. Schneider Service Co.*, 661 F.2d 709, 710 (8th Cir. 1981) affirms just such a practice.

In like manner, the fact that there was no mention of a new trial in the ruling on the post-trial motions was meaningless with regard to the declaration of mistrial

because the grant of Respondent's motion for JMOL was dispositive of the case (judgment of non-infringement was granted) and, accordingly, no new trial was required. *See, e.g., Mulholland v. Schneider, supra.*

E. Existing Jurisprudence Regarding Mistrials

When a mistrial is declared, partial responses to interrogatories are as if they never happened. Thus, in the present case, there could be no "jury verdict" to which the Federal Circuit owed any deference. As held in *People v. Hudson,* 171 Ill. App. 3d 1029, 526 N.E.2d 164, 171:

> ". . . a hung jury does not make 'findings'. A finding is the final unanimous decision reached by the court or jury. A mistrial is no trial at all (*Smock v. Williamson,* [1967], 80 Ill. App. 2d 218, 223, N.E.2d 741), but a nullity from which no finding arises. A hung jury is defined as '[a] jury so irreconcilably divided in opinion that they cannot agree upon any verdict' (Black's Law Dictionary, 667) 5th Ed. 1979).)" (emphasis added).

Similarly, in *Estate of Bartholomae*, 261 Cal. App. 2d 839, 68 Cal. Rptr. 332 (1968) the Court said:

> "A mistrial and a new trial are unlike in both name and effect. A mistrial is equivalent to no trial; it is a nugatory trial. A new trial recognizes a completed trial which for sufficient reasons has been set aside so that the issues may be tried de novo. A court has no power whatever to make an order based on a mistrial." (emphasis added).

This fundamental impact of the declaration of a mistrial is so well settled that *Corpus Juris Secundum,* at 88 C.J.S. § 36, states:

> "A mistrial vitiates all proceedings taken in the case up to that time, and, in legal effect, is equivalent to no trial at all." (emphasis added).

So it was here. When the District Court declared a mistrial and discharged the jury, the partial answers to the jury interrogatories legally evaporated. Absent the District Court's subsequent grant of Petitioner's Motion for JMOL, a new trial on all issues would have been necessary.

Thus, until the decision by the Federal Circuit in the present case, notion that a ruling on post-trial motions could have the effect of nullifying the declaration of a mistrial and resurrecting non-dispositive answers to jury interrogatories has been alien to the jurisprudence of the United States.

II.

THE DECISION BELOW HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF FEDERAL PROCEDURE AS TO CALL FOR AN EXERCISE OF SUPERVISION BY THIS COURT

A. The Supervisory Role of This Court

On occasion, and it is believed that this is one of those occasions, it is necessary for this Court to step in and

correct a substantial and serious departure by a lower court from normal federal procedure. This principle is, of course, embodied in Rule 10.1(a) of this Court.

This Court has granted certiorari to the Court of Appeals for the Federal Circuit for just such a reason on previous occasions, *e.g., Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988) where the Federal Circuit ruled that, although it acknowledged that it had no jurisdiction to do so, it would render a decision in a case because another circuit had declined to accept the case on an attempted inter-circuit transfer. The present case is far less unique than *Christianson* since mistrials in patent cases submitted to juries under Rule 49(a) of the Federal Rules of Civil Procedure are far more likely to occur in the future than the failed attempt at inter-circuit transfer in *Christianson*.

B. Certiorari Has Recently Been Granted to the Federal Circuit for Somewhat Similar Supervisory Purposes

On June 5, 1995, this Court granted certiorari in *American Airlines, Inc. v. Lockwood*, Supreme Court Case No. 94-1660, wherein the Federal Circuit relied upon a plaintiff's request for damages in a dismissed complaint to award him a jury trial on the defendant's claim for declaratory relief. In other words, in *American Airlines*, the Federal Circuit used, as it did in the present case, something that no longer existed (there, a dismissed complaint; here, answers to jury interrogatories which had been rendered non-existent by the declaration of a mistrial) upon which to base its decision. Thus, just as it was

appropriate to grant certiorari in *American Airlines*, it is appropriate to do so here.

CONCLUSION

The present case urgently needs the supervisory attention of this Court. Grant of this Petition is respectfully requested.

Respectfully submitted,

DATE: June 14, 1995

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APPENDIX A

United States Court of Appeals for the Federal Circuit

93-1284, -1302

BAXTER HEALTHCARE CORPORATION
and UTAH MEDICAL PRODUCTS, INC.,

Plaintiffs-Appellants,

v.

SPECTRAMED, INC.,

Defendant/Cross-Appellant.

DECIDED: March 17, 1995

Before MICHEL and PLAGER, ***Circuit Judges***, and MESKILL, ***Senior Circuit Judge****

PLACER, ***Circuit Judge.***

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*Honorable Thomas J. Meskill, Senior Circuit Judge, U.S. Court of Appeals for the Second Circuit, sitting by designation.

This is a patent infringement case. In addition to deciding the merits of the judgment rendered by the trial court, we must also examine the question of a trial court's options when a jury decides some, but not all, of the special interrogatories submitted to it. Both parties object to the trial court's disposition of the issues.

Plaintiffs Utah Medical Products, Inc. and Baxter Healthcare Corporation (hereafter collectively "Baxter") appeal, and defendant Spectramed, Inc. ("Spectramed") cross-appeals the March 3, 1993 judgment of the United States District Court for the Central District of California in Civil Action 89-0131. The district court entered judgment for plaintiff Baxter on the issues of inequitable conduct and certain issues of validity regarding U.S. Patent No. 4,610,256 (the '256 patent), but granted Spectramed's post-trial motions for judgment as a matter of law (JMOL) on all issues of infringement.

BACKGROUND

The subject matter of this suit is a blood pressure transducer which is part of a system that continually and directly monitors a patient's blood pressure. In this monitoring system a catheter, placed inside a patient's blood vessel, transmits periodic pressure pulses through a fluid-filled tube in the catheter to a pressure transducer. A thin diaphragm in the pressure transducer deflects to a degree proportionate to the pressure of the pulses through the fluid. The transducer converts the strength of the pulse into a corresponding electrical signal, and transmits this

signal through electrical cabling to a monitor, thus allowing continual measurement of the patient's blood pressure.

The accuracy of the measurements in a direct monitoring system is highly dependent on the transducer; a method of calibration is necessary to insure that the transducer is functioning properly. Historically, calibration was performed by connecting a known pressure source to the transducer's diaphragm via a special port in the transducer, on the same side of the instrument as the connection for the patient's catheter (patient side calibration). The pressure exerted by this source against the fluid in the chamber adjacent to the diaphragm causes the diaphragm to deflect. If the measurement on the monitor differs from the known pressure source, appropriate adjustments are made to the monitor.

This method of calibration is not without some risk to the patient. Although a stopcock shuts off direct contact with the patient during calibration, the known pressure source does come into contact with the same side of the diaphragm as the tube leading to the patient while monitoring blood pressure. This introduces the risk of contaminants entering the patient's bloodstream once the stopcock is released. Moreover, should the person calibrating the transducer fail to close off the connection to the patient, air bubbles could directly enter into the patient's bloodstream, possibly leading to an air embolism.

A. The '256 Patent

On September 25, 1984, Dr. William D. Wallace, a physician at Utah Medical, filed a patent application for an apparatus and method for calibrating transducers in a different manner. Instead of introducing a positive pressure on the patient's side of the transducer, with its corresponding risks, Dr. Wallace's invention avoids contact with the patient's side of the transducer diaphragm by providing a negative or vacuum pressure to be drawn on the backside of the diaphragm (backside calibration). Since the transducer is a differential device and typically balanced to zero pressure, a negative pressure on the backside of the diaphragm will result in the same pressure reading on the monitor as an equal and opposite positive pressure on the front side of the transducer. This known negative pressure deflects the diaphragm which then triggers the previously mentioned conversion into an electrical signal. On September 9, 1986 this application issued as U.S. Patent No. 4,610,256 (the '256 patent) with Claim I, which is illustrative of the '256 patent, reading:

> 1. In a direct blood pressure monitoring system including an indwelling catheter and pressure tubing filled with a fluid for communicating blood pressure pulses to a diaphragm of a pressure transducer, and a monitor for displaying data corresponding to said

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[2] Dr. Wallace's patent application rights were assigned to his employer, Utah Medical, who later granted a license to Baxter, co-plaintiff in this suit.

blood pressure pulses, an apparatus comprising means for placing one side of said diaphragm in communication with said blood pressure pulses in said pressure tubing and catheter, means for venting the other side of said diaphragm to atmospheric pressure, and means for introducing a calibration pressure' on the side of said diaphragm that is vented.

On May 27, 1987 the Patent and Trademark Office (PTO) granted Spectramed's request for reexamination of the '256 patent in light of a newly discovered piece of prior art -- a published article entitled *"A Calibration System for Catheter Transducer Pressure Measurement,"* ***Biomedical Engineering***, May 1976, at 180-82, by R.H.S. Murray and N.A. Howe (hereafter Murray/Howe). Unlike other cited prior art references, this reference taught, ***inter alia***, a means for calibrating on the backside of a transducer diaphragm. The patentee, in his response, argued that although this reference taught backside calibration of a transducer, it did so in a way different from that claimed by the '256 patent. Specifically, the Murray/Howe reference taught backside calibration by physically modifying the transducer, whereas the '256 patented invention utilized a cable both for introducing pressure to the backside of the transducer as well as for transmitting the electrical signal to the monitor. According to the patentee, the use of this cable was neither disclosed nor

contemplated in the Murray/Howe reference.[3] In light of this distinction the patentee amended his claims.[4] Based on this reasoning the examiner allowed the claims as

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[3] One of the authors of the Murray/Howe reference stated in a written declaration that, at the time the article was written, he was unsuccessful in developing and utilizing a cable similar to that claimed in the '256 patent -- one that allowed placing a venting tube into the electrical cable thereby facilitating backside calibration.

[4] The patentee amended original Claims 1, 13 and 42, and added new claims 43 and 44. Illustrative of the amendments made is Claim 1 with the sections within the brackets being the matter that was deleted and the matter printed in italics indicating the additions made to the claim during reexamination:

> 1.In a direct blood pressure monitoring system including an indwelling catheter and pressure tubing filled with a fluid for communicating blood pressure pulses to a diaphragm of a pressure transducer, and a monitor for displaying data corresponding to said blood pressure pulses, an apparatus comprising means for placing one side of said diaphragm in communication with said blood pressure pulses in said pressure tubing and catheter, means for venting the other side of said diaphragm to atmospheric pressure, and **[means]** *a first cable comprising means for electrically connecting said transducer diaphragm to said monitor and said first cable further comprising means for introducing a calibration pressure on the side of said diaphragm that is vented.*

amended, and a Reexamination Certificate issued on June 21, 1988.

B. Defendant's Products

The defendant in this action, Spectramed, began selling its DTX line of transducers as early as May 1983. This device and its accompanying white cable, discussed ***infra***, were on sale in this country more than one year prior to the filing date of the '256 patent, and therefore are prior art under 35 U.S.C. § 102 (b). The device consisted of a transducer housing with an attached cable (referred to hereafter as a "pigtail" cable) having both electrical wiring and a vent passage for venting the backside of the transducer diaphragm. The other end of the pigtail cable, i.e., the side not connected directly to the transducer housing, was attached to an electrical connector. Along with this "transducer Spectramed sold a corresponding white cable which served essentially as an extension cord from the electrical connector on the pigtail cable to a monitor for reading the blood pressure (referred to hereinafter as "white cable"). This product -- DTX with white cable -- was not designed or equipped to perform backside calibration.

In 1985, after the commercial embodiment of the '256 patented invention was put on the market, Spectramed modified its white cable. Specifically, Spectramed altered the female connector on the white cable, which attaches to the electrical connector on the transducer's pigtail cable, by designing an 0-ring to fit around the female connector for the purpose of sealing the connection, and inserting a tube

through the central portion of the female connector venting six or eight inches down the cable. The resulting product -- the gray cable -- when used with the unmodified prior art DTX transducer was capable of performing backside calibration.

Utah Medical, believing that Spectramed's new product infringed their '256 patent, invited Spectramed to enter into a licensing agreement both prior and subsequent to issuance of the '256 patent. Spectramed declined, and instead filed the previously discussed request for reexamination of the '256 patent. In July 1989, shortly after the Reexamination Certificate issued, Utah Medical and Baxter Healthcare Corporation, which had obtained a license for the '256 patent, filed suit against Spectramed alleging that Spectramed's various transducer models -- the DTX, DTX Plus, P10EZ, and P23XL models -- infringed the '256 patent.

C. District Court Proceedings

The trial, which commenced on September 29, 1992, was tried before an eight-member jury in the United States District Court for the Central District of California. At the close of evidence, the jury was instructed to answer fourteen separate Special Jury Interrogatories pursuant to Federal Rule of Civil Procedure (FRCP) 49(a).[5] On

[5] Prior to submitting the special interrogatories to the jury the trial court denied Spectramed's renewed motions for judgment (continued...)

February 19, 1993, the jury returned with unanimous decisions in favor of plaintiff Baxter on twelve of the fourteen interrogatories. In particular, the jury unanimously found that the '256 patent was enforceable and infringed by Spectramed's products.[6] The jury, however, deadlocked on Special Interrogatories 9 and 11. Special Interrogatory 9 pertains to whether the '256 patent is anticipated under 35 U.S.C. § 102(a).[7] Special

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[5](...continued)
as a matter of law (JMOL) which were filed pursuant to FRCP 50(a)(2).

[6] On the infringement issue the jury unanimously found that: (1) Spectramed's accused products (each one of them) infringed, either literally or under the doctrine of equivalents, every asserted claim (Claims 1, 2, 13, 14, 17, 18, 21 and 44) of the '256 patent; (2) Spectramed had induced infringement of all the asserted claims of the '256 patent; and (3) the infringement was willful.

[7] Special Interrogatory 9 reads:

9. Do you find that defendant Spectramed, Inc., has proven by clear and convincing evidence that the claims of the Wallace '256 patent listed below are invalid and that Spectramed is therefore not liable for infringement because Arnold Lee, and/or employees of Spectramed:

(1) conceived and successfully reduced to practice an operable apparatus which contained each and every element of any of the asserted claims; and

(continued...)

Interrogatory 11 addresses the ultimate issue of obviousness under 35 U.S.C. § 103.[8] In response, the trial judge, in the presence of the jury, stated:

> And at this time, I find that there is legal necessity to declare a mistrial with respect to this matter for lack of unanimity with respect to the interrogatories that we have identified.

After the jury had been dismissed the parties filed various motions. Baxter moved pursuant to FRCP 58 that the court enter judgment on the special verdict (i.e., the unanimously answered special interrogatories). In addition, Baxter moved for entry of judgment regarding Special

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[7](...continued)

(2) the apparatus was placed in public use or publicly known prior to September 25, 1984?

[8] Special Interrogatory 11 reads:

11. Has defendant Spectramed, Inc., proven by clear and convincing evidence that the asserted claims are invalid, and that Spectramed is therefore not liable for infringement because differences between the subject matter of the asserted claims and the prior art are such that the subject matter of the asserted claims, as a whole, would have been obvious at the time the alleged invention as made to a person having ordinary skill in the art of blood pressure transducer calibration technology?

Interrogatories 9 and 11.[9] Spectramed, believing that no verdict was returned in light of the declared mistrial, timely moved under FRCP 50(b) for JMOL that (1) Spectramed's devices do not infringe, either literally or under the doctrine of equivalents, the '256 patent; (2) Spectramed did not induce infringement of the '256 patent; (3) the '256 patent is invalid; and (4) the '256 patent is unenforceable. In the alternative, Spectramed moved for a new trial pursuant to either FRCP 50(b) or FRCP 59.

The, trial court thereafter granted plaintiff Baxter's FRCP 58 motion for the entry of judgment in its favor based on the jury's findings regarding certain of the special interrogatories,[10] but denied the motion as to the remaining interrogatories. The court also granted JMOL in favor of Baxter that Spectramed had failed to establish inequitable conduct.

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[9] Although Baxter did not state the rule under which this motion was brought, the district court treated this as a FRCP 58 motion for the entry of judgment. Baxter does not dispute this characterization on appeal.

[10] Special interrogatories 8, 10, 12, 13, 14. These interrogatories related to anticipation under 35 U.S.C. 102(g) (Special Interrogatory 8), anticipation of Claims 1 and 44 based on prior art submitted by Spectramed (Special Interrogatory 10), compliance with 35 U.S.C. § 112 ¶ 2 (Special Interrogatory 12), unenforceability due to inequitable conduct (Special Interrogatory 13), and compliance with the best mode requirement of 35 U.S.C. § 112 ¶ 1 (Special Interrogatory 14).

However, the trial court granted defendant Spectramed's FRCP 50(b) motions on all issues of infringement (i.e. entered judgment as a matter of law that Spectramed neither directly infringed nor induced infringement of the '256 patent). The trial court explicitly declined to enter any judgment on Special Interrogatories 9 and 11. As a result, the trial court's judgment was inconclusive on the issue of validity, but in light of the decision regarding non-infringement, the trial court entered final judgment for Spectramed on March 3, 1993.

On appeal, Baxter challenges the grant of JMOL that Spectramed neither directly infringed nor induced infringement of the '256 patent and the trial court's refusal to enter judgment in their favor on the subject matter of Special Interrogatories 9 and 11. Spectramed cross-appeals the entry of judgment pursuant to FRCP 58 in favor of Baxter on some of the jury's answers to the special interrogatories (Special Interrogatories 8, 10, and 12-14); the trial court's denial of Spectramed's motion for JMOL that the '256 patent was unenforceable and the grant of JMOL for Baxter that the '256 patent was not unenforceable; and the trial court's refusal to rule on Spectramed's FRCP 50(b) motions concerning the subject matter of Special Interrogatories 9 and 11.[11]

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[11] In its brief, Spectramed states that if the court affirms all of the district court's rulings which were in favor of Spectramed, then we only need to consider the issues raised by its cross-appeal with regard to inequitable conduct. Accordingly, the scope of the cross-appeal is dependent on our review of the

(continued...)

DISCUSSION

A.

Initially, we note that when a jury, which is charged with returning special interrogatories pursuant to FRCP 49(a), fails to unanimously agree on some of the answers, as was the case for two of the fourteen special interrogatories in this case, a trial judge has available several different procedural actions prior to dismissing the jury. First, the trial judge could simply resubmit the issues to the jury for further deliberations in hope of obtaining a unanimous verdict. ***Quaker City Gear Works, Inc. v. Skil Corp.***, 747 F.2d 1446, 1453, 223 USPQ 1161, 1165 (Fed. Cir. 1984), ***cert. denied***, 471 U.S. 1136 (1985); ***Turchio v. D/S A/S Den Norske Africa,*** 509 F.2d 101, 105 (2d Cir. 1974); ***see also James W. Moore et al., Moore's Federal Practice*** ¶ 49.36-37 (2d ed. 1993) (stating that issues submitted, but not decided by jury, should be resubmitted if jury has not already been dismissed).

Second, the trial judge could ask the parties if they would be willing to forego the requirement of unanimity and accept a majority verdict. ***See*** Fed. R. Civ. P. 48 (verdicts are to be unanimous unless the parties otherwise stipulate). Third, the trial judge could enter judgment on the basis of the unanimous verdicts if they are dispositive of the case. ***Wahpeton Canvas Co., Inc. v. Frontier, Inc.,***

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[11](...continued)
trial court's decision to enter JMOL in favor of Spectramed on the issue of infringement.

870 F.2d 1546, 1555, 10 USPQ2d 1201, 1208 (Fed. Cir. 1989); ***see, e.g., Skyway Aviation Corp. v. Minneapolis, Northfield & S. Ry.,*** 326 F.2d 701 (8th Cir. 1964) (entering judgment in favor of plaintiff in a negligence suit was appropriate despite fact that jury could not unanimously agree whether plaintiff was contributorily negligent because the jury found that even if plaintiff was contributorily negligent this negligence was not the proximate cause of the accident).

Fourth, the trial judge could declare the entire case a mistrial and order the case reheard in its entirety with a different jury. ***Franki Found Co. v. Alger-Rau & Assoc., Inc.,*** 513 F.2d 581, 585 (3d Cir. 3975). Finally, the trial judge could, in certain situations, order a partial retrial only as to those issues which were not unanimously agreed upon by the jury. ***James Moore et al., Moore's Federal Practice*** ¶ 49.37 (2d ed. 1993) (stating that if a jury fails to answer a special interrogatory a new trial, at least as to that issue, should be granted); ***see also Gasoline Prods. Co. v. Champlin Ref. Co.,*** 283 U.S. 494, 499 (1931) (Seventh Amendment does not require that a correctly determined issue be retried a second time even though justice demands that another distinct issue must be retried).

It should be noted that this is not a case in which the court omitted, and the parties failed to demand, to have submitted to the jury certain issues of fact, thereby waiving the right to a jury trial on these issues. ***See Franki Found. Co.,*** 513 F.2d at 587; ***see also In re Randall,*** 712 F.2d 1275 (8th Cir. 1983) (under FRCP 49(a) a party waives its right to a jury trial of an issue only if it was omitted from

the original submission to the jury). Rather, the unanswered issues in this case were submitted to the jury in the form of Special Interrogatories 9 and 11. Therefore, to the extent that Special Interrogatories 9 and 11 involve factual determinations, these could not have been decided by the trial judge pursuant to FRCP 49(a).

In this case the trial court dismissed the jury without electing any of the above-mentioned options. Instead, the judge disposed of the case by ruling on the parties' numerous post-verdict motions. Prior to discussing these rulings, however, we must first resolve a threshold issue, namely the effect of the judge's statements, in the presence of the jury, that "there is a legal necessity to declare a mistrial with respect to this matter . . ."

Spectramed argues that this declaration nullified all of the jury's answers to the special interrogatories, thereby disempowering the trial court from entering judgment based on the jury's answers. We disagree. Although the district court unquestionably had the authority to declare a mistrial and order a new trial, there was no mention of a mistrial (or new trial) in the final judgment. Instead the district court disposed of the case by ruling on the parties' motions. We therefore conclude that the above-mentioned statement was merely a statement of intent post-trial of the district court, which, on more deliberate consideration, was not acted upon. ***See Wahpeton Canvas Co.,*** 870 F.2d at 1555 n.17, 10 USPQ2d at 1210 n.17. Accordingly, the trial judge's statement had no legal effect on the special verdict. ***See Quaker City***, 747 F.2d at 1453, 223 USPQ at 1165 ("Where a special verdict does not contain one or more

answers requested, it may, unless wholly defective, be accepted for those issues that are resolved. It is a 'special verdict' to the extent findings are made."). We therefore turn to the trial court's final judgment, and the rulings contained therein.

B.

The trial court's post-verdict rulings are of course reviewable on appeal. We have a substantial problem in this particular case, however, in light of the terse four-page judgment of the trial court. This judgment lacks any rationale for the court's decisions on the parties' various post-verdict motions. Specifically, with respect to the court's entry of JMOL in favor of Spectramed on all issues of infringement, the trial court offered no explanation as to how it arrived at this decision. One option in such a case, not to be discarded lightly, is to vacate the judgment of the trial court and remand the matter to that court for a full explication of the reasons for the court's rejection of the jury's findings.

There is another option, however, which avoids the inefficiencies of having the appellate court review and decide the issue twice. We review judgments, not opinions. ***In re Hyatt,*** 708 F.2d 712, 715, 218 USPQ 195, 198 (Fed. Cir. 1983); ***see also Constant v. United States,*** 929 F.2d 654, 657, 18 USPQ2d 1298, 1300 (Fed. Cir.), ***cert. denied***, 501 U.S. 1206 (1991) ("[I]t is the validity of the judgment, not the quality of any opinion supporting it, that has legal significance . . ."). On appeal we are free to examine the record to determine whether the facts support

the judgment. ***See Consolidated Aluminum Corp. v. Foseco Int'l Ltd.***, 910 F.2d 804, 814, 15 USPQ2d 1481, 1489 (Fed. Cir. 1990) ("An appellate court need not close its eyes to the record . . . where . . . there is a way clearly open to affirm the district court's action."). The record before us is adequate for us to fully review the question of whether the trial court correctly granted JMOL on the issue of infringement.

1. Grant of Spectramed's Motion for JMOL on Infringement

In considering whether the district court erred in granting Spectramed's motions for JMOL on the issue of infringement, we must keep in mind the standard of review when assessing a jury verdict: whether the jury's express or implied findings of fact are supported by substantial evidence. ***See Read Corp. v. Portec Inc.***, 970 F.2d 816, 821, 23 USPQ2d 1426, 1431 (Fed. Cir. 1992). This test "requires us to decide for ourselves whether reasonable jurors viewing the evidence as a whole could have found the facts needed to support the verdict in light of the applicable law." ***Lemelson v. General Mills, Inc.***, 968 F.2d 1202, 1207, 23 USPQ2d 1284, 1288 (Fed. Cir. 1992), ***cert. denied,*** 113 S. Ct. 976 (1993). Accordingly, the specific issue before us is whether the district court erred in its determination that no reasonable jury could have found claims 1, 2, 13, 14, 17, 18, 21, and 44 of the '256 patent, properly construed, to be literally infringed by Spectramed's accused devices.

Determining whether a claim in a patent has been infringed is a two-step process: first, the claim must be interpreted, as a matter of law, to ascertain its proper scope; second, a determination must be made whether the properly construed claim reads on the accused device. ***Lemelson***, 968 F.2d at 1206, 23 USPQ2d at 1287. The first step, claim interpretation, is a question of law. The second, infringement, is a question of fact. ***North Am. Vaccine, Inc. v. American Cyanamid Co.***, 7 F.3d 1571, 1574, 28 USPQ2d 1333, 1335 (Fed. Cir. 1993), ***cert. denied***, 114 S. Ct. 1645 (1994). We first consider literal infringement,[12] which requires that each limitation in the asserted claim be found present in the accused device or process. ***Id.*** Unlike many cases that come before us, the parties do not dispute the meaning of the claim terms. The question instead turns on whether the accused devices infringe the claims as written. Spectramed's principal argument in support of the district court's grant of JMOL is that their "accused devices"[13] cannot infringe because

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[12] In view of our decision on literal infringement, we need not address infringement under the doctrine of equivalents.

[13] The term "accused devices" refers to the combination of Spectramed's various blood pressure transducers with the connecting gray cable. Spectramed argues that this term should not include the connecting gray cable. However, the claims at issue include a limitation for a cable that provides backside calibration and connects the transducer to a monitor, and therefore we conclude that inherent in the jury's findings of infringement was that the term "accused devices" in the

(continued...)

Spectramed's gray connecting cables, which are used in combination with the prior art DTX transducer, were constructed using only the teachings of a prior art reference, the Murray/Howe publication. Spectramed argues that the record is devoid of substantial evidence showing that their gray cable is different from that disclosed in Fig. 4 of Murray/Howe. According to Spectramed, the trial court properly set aside the jury's findings of infringement because Spectramed only used what was already disclosed in the prior art, viz., their prior art DTX device in 'combination with the teaching of Murray/Howe regarding backside calibration.

Implicit in Spectramed's argument is that Baxter, in order to establish literal infringement, must prove by a preponderance of the evidence that Spectramed's accused devices embody all the limitations in the asserted claims, and in addition, Spectramed's accused devices must not be an adoption of the combined teachings of the prior art. This is not a correct statement of the law governing patent infringement. There is no requirement that the accused device be nonobvious in light of the prior art, or otherwise be itself patentable. Literal infringement exists if each of the limitations of the asserted claim(s) read on, that is, are found in, the accused device. Questions of obviousness in

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[13](...continued)
complaint consisted of the transducers in combination with the gray cable. Since this inherent jury finding was supported by substantial evidence, we conclude that the term "accused devices" consists of Spectramed's transducers in combination with their gray cable.

light of the prior art go to validity of the claims, not to whether an accused device infringes.[14]

With the correct test in mind, and in the absence of the trial judge's explanation of why she thought the jury's finding on infringement unsupported, we have independently examined the record before the jury. We conclude that there was ample evidence before the jury to support a finding that the claims, as construed, read on Spectramed's accused devices. Given the deferential standard applied to jury verdicts, we find no basis for upsetting the jury verdict in this regard, and accordingly we reverse the trial court's grant of JMOL of no infringement.[15]

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[14] Spectramed's argument could also be used to limit the permissible range of equivalents under the doctrine of equivalents. ***see, e.g., Wilson Sporting Goods Co. v. David Geoffrey & Assoc.***, 904 F.2d 677, 14 USPQ2d 1942 (Fed. Cir.), ***cert. denied***, 498 U.S. 992 (1990), but since we conclude that Spectramed literally infringes, we need not consider infringement under the doctrine of equivalents.

[15] We also conclude that there is substantial evidence to support the jury's finding that Spectramed induces infringement of Claim 20. Baxter did not allege literal infringement of this claim.

2. *Refusal to Enter Judgment on Special Interrogatories 9 and 11*

Baxter also appeals the district court's refusal to enter judgment in their favor on the issues in Special Interrogatories 9 and 11. According to Baxter, the jury's failure to unanimously find in favor of Spectramed with respect to anticipation and obviousness, the subject matter of Special Interrogatories 9 and 11, supports a conclusion that Spectramed has failed to meet its burden of proving invalidity on these issues by clear and convincing evidence. It therefore follows, argues Baxter, that the court should have entered judgment in favor of Baxter on Special Interrogatories 9 and 11. We disagree.

Baxter moved for judgment on Special Interrogatories 9 and 11 under FRCP 58. Although this rule does allow a court to enter judgment upon receiving a special verdict, the jury did not agree on answers to Special Interrogatories 9 and 11, and therefore these issues did not form a part of the special verdict. ***See Quaker City,*** 747 F.2d at 1452-53, 223 USPQ at 1165. Accordingly, the district court did not err in declining to enter judgment pursuant to Baxter's FRCP 58 motion.

3. *Cross-Appeal*

In light of our reversal of the trial court's grant of JMOL on the infringement issue, we turn to Spectramed's cross-appeal. Spectramed first argues that the district court erred in denying its motion for JMOL that the '256 patent is unenforceable due to inequitable conduct. Spectramed

contends that during prosecution the patentee withheld material prior art and seriously misstated the content of the Murray/Howe reference, and that culpable intent must be inferred from these misrepresentations. Though citing various aspects of the record to support their arguments, Spectramed ignores the standard of review which this court is bound to apply.

Because it is an equitable issue, the ultimate determination of inequitable conduct is committed to the discretion of the trial court and reviewed by this court for abuse of discretion. ***Kingsdown Medical Consultants, Ltd. v. Hollister, Inc.***, 863 F.2d 867, 876, 9 USPQ2d 1384, 1392 (Fed. Cir. 1988) (in banc), ***cert. denied,*** 490 U.S. 1067 (1989). Establishing that inequitable conduct occurred during prosecution of a patent requires proof by clear and convincing evidence of two underlying facts: that the misrepresentation was material, and that the patentee acted with intent to deceive. ***Kingsdown***, 863 F.2d at 872, 9 USPQ2d at 1389. Since inequitable conduct is a matter for the trial judge, and not the jury, these factual issues ordinarily are not jury questions. Although the ultimate determination of whether inequitable conduct occurred is reviewed under the abuse of discretion standard, the question of whether the trial judge correctly found the existence of these underlying facts is reviewed under the traditional standard for fact finding, the clearly erroneous standard. ***General Electro Music Corp. v. Samick Music Corp.***, 19 F.3d 1404, 1408, 30 USPQ2d 1149, 1152 (Fed. Cir. 1994).

However, in this case both parties consented to a jury trial of these factual issues in the form of special interrogatories. Accordingly, we grant the jury the deference due it and review their findings under the substantial evidence standard. We will not disturb the judgment at issue here unless it is based upon a jury's findings of fact that are unsupported by substantial evidence, a misapplication or misinterpretation of the applicable law by the judge, or evidences a clear error of judgment. ***Modine Mfg. Co. v. Allen Group, Inc.***, 917 F.2d 538, 541, 16 USPQ2d 1622, 1624 (Fed. Cir. 1990).

The jury unanimously found that Spectramed had failed to prove either materiality or intent to mislead the PTO. Upon reviewing the record as a whole we find substantial evidence to support the finding of a lack of requisite intent. In particular, Dr. Wallace, the patentee, testified that during the prosecution of the '256 patent he was unaware of any other prior art that was relevant to the novel aspect of his claimed invention, namely a cable that provided for venting and backside calibration of a transducer. In evaluating whether there is substantial evidence in the record on this point, we accord great deference to the jury's view of such testimony. ***See id.*** at 542, 16 USPQ2d at 1625 ("[T]he persons accused of inequitable conduct actually testified as witnesses, and the jury's assessment of their character and credibility is entitled to great deference."). Moreover, Spectramed's proof of intent rests entirely on inferences to be drawn from the materiality of the alleged misrepresentations. Such inferences, though appropriate if made by the trier of fact, are not for the trial judge to make on JMOL, or for this

court on appeal. Accordingly, we conclude that the trial court did not abuse its discretion in denying Spectramed's motion for JMOL on the issue of inequitable conduct.

However, paragraph 2 of the trial court judgment, which grants JMOL in favor of Baxter that the patent was not obtained through inequitable conduct, must be vacated. Baxter did not move for JMOL under FRCP 50(b) at the close of all the evidence. Furthermore, paragraph 2 is superfluous in light of paragraph 1 of the trial court judgment, which enters judgment in favor of Baxter based on the jury's findings that the '256 is not unenforceable due to inequitable conduct.

Spectramed further argues in its cross-appeal that the district court erred by not expressly ruling, in response to Spectramed's Rule 50(b) motions, that the claims at issue are obvious over the prior art DTX transducer in combination with Fig. 4 of the Murray/Howe reference. Whether the claims at issue in the '256 patent are obvious in light of the combined teachings of the prior art was the subject of Special Interrogatory 11. The jury did not unanimously decide this issue, with the result there was no jury verdict on this matter. The trial court specifically stated with regard to this issue: "No judgment shall be entered on defendant Spectramed, Inc.'s counterclaim . . . that the Wallace '256 patent would have been obvious to a person having ordinary skill in the art, and that it is therefore invalid under 35 U.S.C. § 103 . . ."

Spectramed assigns this failure to rule on its 50(b) motion as error. Spectramed is correct. The trial court

should have acted to obtain a decision on the invalidity defense, particularly in view of a jury verdict that found for plaintiff on infringement.

In view of our decision that the trial court erred in granting JMOL for Spectramed on the issue of infringement, we have considered whether, in the interests of judicial economy, we should decide in the first instance the question of invalidity for obviousness. It is likely that all the relevant matter is in the record, and the question of obviousness is ultimately a question of law. Nevertheless, we sit as a court to review claims that a trial judge erred, and not as a court of first instance.

The error here is the failure of the judge to have entered judgment regarding the question of invalidity. Spectramed was entitled to have a final determination by the trial court on its allegations that the patent in suit was invalid, a determination that we could properly review on appeal. The trial court acknowledged that her judgment adjudicated fewer than all of the claims made by the parties, but nevertheless entered final judgment on those that were adjudicated. It is now necessary for the trial judge to decide the remaining issue of invalidity under § 103.

CONCLUSION

The trial court's grant of JMOL that Spectramed did not infringe the '256 patent is reversed. The trial court's refusal to enter judgment in favor of Baxter on the issues in Special Interrogatories 9 and 11 is affirmed. Likewise, the trial court's decision on the issue of inequitable conduct is affirmed, except with respect to paragraph 2 of the judgment, which is vacated. The case is remanded to the trial court for a ruling on Spectramed's motions regarding validity of the '256 patent.

COSTS

Each party to bear its own costs.

AFFIRMED-IN-PART, REVERSED-IN-PART, VACATED-IN-PART, AND REMANDED

APPENDIX B

FILED
MARCH 2, 1993
ENTERED
MARCH 3, 1993
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT
OF CALIFORNIA
SANTA ANA OFFICE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BAXTER HEALTHCARE CORP, and UTAH MEDICAL PRODUCTS, INC., Plaintiffs,	)	Civil Action No. SACV 89-131 AHS (RWRx)
v.	)	
SPECTRAMED, INC., Defendant.	)	JUDGMENT
SPECTRAMED, INC., Counterclaimant,	)	
v.	)	
BAXTER HEALTHCARE CORP, and UTAH MEDICAL PRODUCTS, INC., Counterdefendants.	)	

This action came on for trial before the Court and a jury, the Honorable Alicemarie H. Stotler, District Judge, presiding, and the issues having been duly tried and the jury having returned its answers to the Special Jury

Interrogatories, and the Court having granted certain motions brought by the parties under Federal Rules of Civil Procedure 50 and 58,

IT IS ORDERED AND ADJUDGED AS FOLLOWS:

1. Based on the responses to Special Jury Interrogatories 8, 10, and 12-14, plaintiffs Baxter Healthcare Corporation and Utah Medical Products, Inc., are entitled to judgment in their favor that the Wallace '256 patent is not invalid on defendant Spectramed, Inc.'s counterclaims that the Wallace '256 is invalid due to:

(a) prior invention (paragraph 8(e) of the Pre-Trial Conference Order and paragraph 14(i) of the Answer and Amended Counterclaim to the Amended Complaint);

(b) anticipation by prior art (paragraph 8(e) of the Pre-Trial Conference Order and paragraphs 14(d) and 14(f) of the Answer and Amended Counterclaim to the Amended Complaint);

(c) indefiniteness (paragraph 8(h) of the Pre-Trial Conference Order and paragraph 14(k) of the Answer and Amended Counterclaim to the Amended Complaint);

(d) inequitable conduct before the United States Patent and Trademark Office (paragraph 8(j) of the Pre-Trial Conference Order and paragraph 21 of the Answer and Amended

Counterclaim to the Amended Complaint); and,

(e) failure to set forth the best mode (paragraph 8(g) of the Pre-Trial Conference Order and paragraph 14(l) of the Answer and Amended Counterclaim to the Amended Complaint).

2. Plaintiffs Baxter Healthcare Corporation and Utah Medical Products, Inc., are entitled to judgment as a Matter of Law that defendant Spectramed, Inc. has failed to establish that plaintiffs engaged in inequitable conduct before the United States Patent & Trademark Office (paragraph 8(j) of the Pre-Trial Conference Order and paragraph 21 of the Answer and Amended Counterclaim to the Amended Complaint).

3. No judgment shall be entered on defendant Spectramed, Inc.'s counterclaim that the Wallace '256 patent is invalid based on prior public use or prior public knowledge under 35 U.S.C. § 102 (paragraph 8(e) of the Pre-Trial Conference Order and paragraph 14(c) of the Answer and Amended Counterclaim to the Amended Complaint), or on defendant Spectramed, Inc.'s counterclaim that the Wallace '256 patent would have been obvious to a person having ordinary skill in the art, and that it is therefore invalid under 35 U.S.C. § 103 (paragraph 8(f) of the Pre-Trial Conference Order and paragraph 14(j) of the Answer and Amended Counterclaim to the Amended Complaint).

4. Defendant Spectramed, Inc., is entitled to judgment as a Matter of Law that it has not induced infringement of Claim 20 of the Wallace '256 patent.

5. Defendant Spectramed, Inc., is entitled to judgment as a Matter of Law that it has not induced infringement of claims 1, 2, 13, 14, 17, 18, 20, 21 or 44 with regard to its P23XL and P10EZ products.

6. Defendant Spectramed, Inc., is entitled to judgment as a Matter of Law that the DTX device does not directly infringe the '256 patent, that the P23XL and the P10EZ do not infringe any claim of the '256 patent, and that the '256 patent is not infringed.

Since this Judgment adjudicates fewer than all of the claims made by the parties to this action, the Court directs entry of final judgment on the foregoing and expressly finds that there is no just reason for delay in the entry of final judgment.

IT IS SO ORDERED.

Dated at Santa Ana, California, this 2nd day of March, 1993.

/s/ Alicemarie H. Stotler
ALICEMARIE H. STOTLER
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Date March 2, 1993

ENTERED
March 3, 1993
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT
OF CALIFORNIA
SANTA ANA OFFICE
THIS CONSTITUTES NOTICE OF
ENTRY AS REQUIRED BY FRCP,
RULE 77(d)

CIVIL MINUTES - GENERAL

Case No. SA CV 89-131 AHS (RWRx)
Title: Baxter Healthcare Corp. et al v. Spectramed, Inc.

PRESENT:

Hon. Alicemarie H. Stotler, Judge
Shirley Pfeifer, Deputy Clerk
Kathy Haaland, Court Reporter

PROCEEDINGS:

1. Plaintiffs' Rule 58 Motion for entry of Judgment on Special Jury Interrogatories 1-8, 10, and 12-14;
2. Plaintiffs' Motion for Entry of Judgment re Jury Interrogatories 9 and 11;
3. Defendant's Renewal of Motions Under Rule 50;

4. Defendant's Motion for Judgment as a Matter of Law of Non-Infringement of Claims 2, 13, 14, 17, 18, and 20;
5. Defendant's Motion for Judgment as a Matter of Law re Invalidity of Claim 44;
6. Defendant's Motion for Judgment as a Matter of Law re Non-Infringement of Claims 1, 44 and all Dependent Claims;
7. Defendant's Motion for Judgment as a Matter of Law that the '256 Patent is Anticipated by the DTX Device or That the DTX Device Does Not Directly Infringe the '256 Patent;
8. Defendant's Motion for Judgment as a Matter of Law That the Claims in Issue Are Invalid Due to Prior Invention by Arnold Lee and Prior Knowledge or Use of the Lee System;
9. Defendant's Motion for Judgment as a Matter of Law that the P23XL and the P10EZ Do Not Infringe Any Claim of the '256 Patent;
10. Defendant's Motion for Judgment as a Matter of Law that Spectramed has Not Infringed Claim 20 of the '256 Patent;
11. Defendant's Motion for Judgment as a Matter of Law That the '256 Patent is Not Infringed and/or is Invalid;
12. Defendant's Motion for Judgment as a Matter of Law That Claims 1, 2, 13, 14, 17, 18, 21 and 44 are Invalid Because of Spectramed's Blue Sky Backside Calibration System;
13. Defendant's Motion for Judgment Under Rule 50(a) That Claims 1 and 21 are Invalid by Reason of Indefiniteness;

14. Defendant's Motion for Judgment as a Matter of Law That Spectramed Has Not Infringed Any of the '256 Patent Claims;
15. Plaintiffs' Motion for Judgment as a Matter of Law That Spectramed Fails to Establish Any Alleged Inequitable Conduct, and Defendant's Cross-Motion;
16. Defendant's Motion that the '256 Patent is Not Infringed Under a Doctrine of Equivalents Theory;
17. Defendant's Motion that Claims 1, 2, 13, 14, 17, 18, 21, and 44 are Invalid Under 35 U.S.C. § 102(b);
18. Defendant's Motion That the '256 Patent Fails to Establish the "Best Mode" Requirement of 35 U.S.C. § 112;
19. Defendant's Motion that Spectramed Has Not Willfully Infringed the '256 Patent;
20. Defendant's Motion that the Claims at Issue are Invalid Under 35 U.S.C. § 103;
21. Defendant's Motion that it Has Not Induced Infringement of Any of the Claims of the '256 Patent in Violation of 35 U.S.C. § 271(b) With Regard to Its P23Xl, P10EZ, and Provisionally, Its P23XL-1 and P10EZ-1 Products; and
22. Defendant's Motion to Strike Plaintiffs' Pleading.

Counsel present and argue. The court rules in accordance with the tentative ruling, furnished to counsel, and attached hereto. Plaintiffs' Rule 58 motion is granted to the extent that it moves for entry of judgment as to Jury Interrogatories 8, 10, and 12-14, but denied as to the remaining interrogatories. The court rules as follows with respect to defendant's renewal of its motions under Rule 50: As enumerated above, Numbers 4, 5, 6, 8, 12, 13,

14, 15, 17, 18, 19 and 20 are Denied; Numbers 7, 9, 10, 11, 21 and 22 are Granted. Plaintiffs' Rule 50 Motion for Entry of Judgment on Special Jury Interrogatories 9 and 11 is denied. Plaintiffs' Motion for Judgment as a Matter of Law that Spectramed Fails to Establish Any Alleged Inequitable Conduct is granted and the cross-motion of defendant is denied.

Counsel are furnished a proposed Judgment prepared by the court and make their comments as to the form of such Judgment. The court shall issue the revised judgment, to be filed this date.

As to the rulings with respect to the subject motions, this Minute Order constitutes the order of the court.

The stipulation of counsel as to return and safeguarding exhibits is filed.

Atch: Tentative Ruling
cc: cnsl of record

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE ALICEMARIE H. STOTLER,
JUDGE, PRESIDING

TENTATIVE RULING
ON LAW & MOTION MATTERS

March 2, 1993 Calendar No. 1

CASE: Baxter Healthcare Corp., et al v. Spectramed, Inc.
SA CV 89-131 AHS (RWRx)

MOTION(S) PENDING:

1. Plaintiffs' Rule 58 Motion for entry of Judgment on Special Jury Interrogatories 1-8, 10, and 12-14;
2. Plaintiffs' Motion for Entry of Judgment re Jury Interrogatories 9 and 11;
3. Defendant's Renewal of Motions Under Rule 50;
4. Defendant's Motion for Judgment as a Matter of Law of Non-Infringement of Claims 2, 13, 14, 17, 18, and 20;
5. Defendant's Motion for Judgment as a Matter of Law re Invalidity of Claim 44;
6. Defendant's Motion for Judgment as a Matter of Law re Non-Infringement of Claims 1, 44 and all Dependent Claims;
7. Defendant's Motion for Judgment as a Matter of Law that the '256 Patent is Anticipated by the DTX Device or That the DTX Device Does Not Directly Infringe the '256 Patent;

8. Defendant's Motion for Judgment as a Matter of Law That the Claims in Issue Are Invalid Due to Prior Invention by Arnold Lee and Prior Knowledge or Use of the Lee System;
9. Defendant's Motion for Judgment as a Matter of Law that the P23XL and the P10EZ Do Not Infringe Any Claim of the '256 Patent;
10. Defendant's Motion for Judgment as a Matter of Law that Spectramed has Not Infringed Claim 20 of the '256 Patent;
11. Defendant's Motion for Judgment as a Matter of Law That the '256 Patent is Not Infringed and/or is Invalid;
12. Defendant's Motion for Judgment as a Matter of Law That Claims 1, 2, 13, 14, 17, 18, 21 and 44 are Invalid Because of Spectramed's Blue Sky Backside
13. Defendant's Motion for Judgment Under Rule 50(a) That Claims 1 and 21 are Invalid by Reason of Indefiniteness;
14. Defendant's Motion for Judgment as a Matter of Law That Spectramed Has Not Infringed Any of the '256 Patent Claims;
15. Plaintiffs' Motion for Judgment as a Matter of Law That Spectramed Fails to Establish Any Alleged Inequitable Conduct, and Defendant's Cross-Motion;
16. Defendant's Motion that the '256 Patent is Not Infringed Under a Doctrine of Equivalents Theory;
17. Defendant's Motion that Claims 1, 2, 13, 14, 17, 18, 21, and 44 are Invalid Under 35 U.S.C. § 102(b);

18. Defendant's Motion That the '256 Patent Fails to Establish the "Best Mode" Requirement of 35 U.S.C. § 112;
19. Defendant's Motion that Spectramed Has Not Willfully Infringed the '256 Patent;
20. Defendant's Motion that the Claims at Issue are Invalid Under 35 U.S.C. § 103;
21. Defendant's Motion that it Has Not Induced Infringement of Any of the Claims of the '256 Patent in Violation of 35 U.S.C. § 271(b) With Regard to Its P23Xl, P10EZ, and Provisionally, Its P23XL-1 and P10EZ-1 Products; and
22. Defendant's Motion to Strike Plaintiffs' Pleading.

---

1. The Court grants in part and denies in part plaintiffs' Rule 58 Motion for Entry of Judgment. The Court grants plaintiffs' motion to the extent that it seeks entry of judgment based on special Jury Interrogatories 8, 10, and 12-14. The responses to these interrogatories are not inconsistent with the jury's inability to reach a unanimous decision on defendant's claims for invalidity based on obviousness and prior public use or public knowledge. On invalidity, these responses constitute a "special verdict" to the extent findings on specific issues have been made; they do not render the Special Jury Interrogatories defective in their entirety. See, Quaker City Gear Works, Inc. v. SKil Corp., 747 F.2d 1446 (Fed. Cir. 1984).

However, the responses to Special Jury Interrogatories 1-4 cannot be entered as the final judgment; the findings of infringement are defective given the jury's inability to reach a final decision on every question

regarding invalidity of the Wallace '256 patent. Id. The Court therefore denies plaintiffs' motion as it pertains to entry of judgment on Special Jury Interrogatories 1-4. Those answers, however, as well as the answers to Special Jury Interrogatories 5-7, are recorded as the findings of the trier of fact.

2. The Court denies plaintiffs' motion. Plaintiffs' failure to move for Judgment as a Matter of Law under fed. R. Civ. P. 50(a) prior to the submission of this matter to the jury precludes the present motion. Moreover, although a "jury's lack of unanimity on certain special verdicts can reasonably be taken to mean . . . that invalidity ha[s] not been proved by clear and convincing evidence," the absence of a general verdict finding validity of the '256 patent undercuts the inference that the lack of unanimity means necessarily that defendant failed to carry its burden of proof. Richardson v. Suzuki Motor Co., Ltd., 868 F.2d 1226 (Fed. Cir. 1989).

3. The Court rules on defendant's renewal of motions as outline below in numbers 4 through 21.

4. The Court denies defendant's motion.

5. The Court denies defendant's motion.

6. The Court denies defendant's motion.

7. The Court grants defendant's motion as to non-infringement

8. The Court denies defendant's motion.

9. The Court grants defendant's motion as to non-infringement.

10. The Court grants defendant's motion.

11. The Court grants defendant's motion as to non-infringement.

12. The Court denies defendant's motion.

13. The Court denies defendant's motion.

14. The Court denies defendant's motion.

15. The Court grants plaintiffs' motion, and denies defendant's cross-motion.

16. The Court denies defendant's motion.

17. The Court denies defendant's motion.

18. The Court denies defendant's motion.

19. The Court denies defendant's motion.

20. The Court denies defendant's motion.

21. The Court grants defendant's motion.

22. The Court grants defendant's motion. The proposed Statement of Uncontroverted Statement of Facts and Conclusions of Law is without foundation and procedurally improper at this stage of the litigation.

The Court has also drafted a possible form of Judgment for this action. After resolution of the foregoing matters and after a brief recess, the Court will supply to counsel for consideration the appropriate proposed Judgment; the Court will then reconvene to hear counsels' objections to, arguments on, or suggestions about the proposed form of Judgment.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE ALICEMARIE H. STOTLER,
JUDGE PRESIDING

BAXTER HEALTHCARE CORP, and UTAH MEDICAL PRODUCTS, INC., Plaintiffs,	) No CV 89-131AHS
v.	
SPECTRAMED, INC., Defendant.	

REPORTER'S TRANSCRIPT OF PROCEEDING
Santa Ana, California

February 19, 1993

Kathleen J. Haaland, CSR
Official Court Reporter
412 United States Courthouse
751 Santa Ana Boulevard
Santa Ana, CA 92701

February 19, 1993, Page 7395, lines 17-22:

THE COURT: The record will show once again the presence of the jury in this matter.

And at this time, I find that there is legal necessity to declare a mistrial with respect to this matter for lack of unanimity with respect to the interrogatories that we have identified.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE ALICEMARIE H. STOTLER,
JUDGE PRESIDING

BAXTER HEALTHCARE CORP, and UTAH MEDICAL PRODUCTS, INC., Plaintiffs,	) No CV 89-131AHS
v.	
SPECTRAMED, INC., Defendant.	

REPORTER'S TRANSCRIPT OF PROCEEDING
Santa Ana, California

February 23, 1993

Kathleen J. Haaland, CSR
Official Court Reporter
412 United States Courthouse
751 Santa Ana Boulevard
Santa Ana, CA 92701

February 23, 1993, Page 7403, lines 6-9:

THE COURT: The record will show that this is a hearing in the matter entitled Baxter versus Spectramed. And the Court had after the mistrial was declared set this down for a scheduling conference.

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE ALICEMARIE H. STOTLER,
JUDGE PRESIDING

BAXTER HEALTHCARE CORP, and UTAH MEDICAL PRODUCTS, INC., Plaintiffs,	) No CV 89-131AHS
v.	
SPECTRAMED, INC., Defendant.	

REPORTER'S TRANSCRIPT OF PROCEEDING
Santa Ana, California

March 2, 1993

Kathleen J. Haaland, CSR
Official Court Reporter
412 United States Courthouse
751 Santa Ana Boulevard
Santa Ana, CA 92701

March 2, 1993, Page 5, lines 7-13:

Since counsel has had an opportunity to review the Court's written tentative ruling, it is self-evident as to what it is the Court refers. And I will first turn to defendants who -- defendant, rather -- who had at the time the Court declared the mistrial indicated that all of its previous motions brought under Rule 50 would be renewed.

(2)

No. 94-2069

FILED

JUL 17 1995

CLERK

In The

Supreme Court of the United States

October Term, 1995

SPECTRAMED, INC.,

Petitioner,

v.

BAXTER HEALTHCARE CORPORATION and UTAH MEDICAL PRODUCTS, INC.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should certiorari be granted in a case where the United States Court of Appeals for the Federal Circuit properly interpreted the District Court's Judgment that there was not a declaration of mistrial, and where the District Court's Order and the Court of Appeals' interpretation thereof affect no one other than the parties to the instant case, and where other issues in the instant case, including patent infringement, patent validity and appropriate preservation of answers to special jury interrogatories will be properly resolved upon remand to the District Court?

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Reporter's Transcript of Proceedings, Before the United States District Court for the Central District of California, March 2, 1993, p. 34, ll. 15-23 . . . . A1

No. 94-2069

In The

Supreme Court of the United States

October Term, 1995

SPECTRAMED, INC.,

Petitioner,

v.

BAXTER HEALTHCARE CORPORATION and UTAH MEDICAL PRODUCTS, INC.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Baxter Healthcare Corporation and Utah Medical Products, Inc. respectfully submit this Brief in Opposition to the Petition For Writ of Certiorari filed by Petitioner Spectramed, Inc. seeking to review the decision rendered by the United States Federal Circuit Court of Appeals in this matter on March 17, 1995.

OPINIONS BELOW

Petitioner has attached copies of the opinion of the United States Court of Appeals for the Federal Circuit in its appendix (hereinafter "Pet. App. ___") at Pet. App. A 1. The opinion is reported at *Baxter Healthcare Corp. v. Spectramed, Inc.*, 49 F.3d 1575 (Fed. Cir. 1995). The Final Judgment of the United States District Court for the Central District of California, which was the subject of appeal to the Federal Circuit, is unreported and attached by Petitioner at Pet. App. B. Petitioner has likewise attached Civil Minutes and Tentative Rulings On Law and Motion matters and Reporter's Transcripts of Proceedings, dated February 19 and 23, 1993 and March 2 and 3, 1993 at Pet. App. C, Pet. App. D, Pet. App. E and Pet. App. F. Separate reference is made herein to additional appendices of Respondents as ("Resp. App. ___").

JURISDICTION

The Judgment of the United States Court of Appeals for the Federal Circuit was entered on March 17, 1995. Pet App. A 1-26. The Petition for Writ of Certiorari was filed on June 14, 1995. This Court has jurisdiction to review cases in the Court of Appeals based upon 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The facts of the instant case and its procedural posture are correctly stated in the opinion of the United

States Court of Appeals for the Federal Circuit. *See* Pet. App. A 2-12.

REASONS FOR DENYING THE WRIT

I. THIS IS NOT THE TYPE OF CASE THAT IS APPROPRIATE FOR SUPERVISORY REVIEW BY THE UNITED STATES SUPREME COURT.

The one thing that is clear from Petitioner's otherwise confusing Petition for Writ of Certiorari is that there is nothing in the Petition that warrants review by this Court.[1] Aside from its interlocutory posture, which by itself justifies denial of the Petition, the instant case involves nothing more than a Court of Appeals' interpretation of the District Court's Judgment concerning whether or not the District Court did or did not declare a mistrial. Moreover, the District Court's Judgment and the Federal Circuit Court of Appeals' interpretation of that Judgment affect no one other than the parties to the instant case.[2]

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[1] This Court receives "nearly 7,000 petitions for certiorari every Term, and can grant only a tiny fraction of them. A high degree of selectivity is thereby enjoined upon [this Court] in exercising [its] certiorari jurisdiction, and [this Court's] Rule 10 embodies the standards by which [it] decide[s] to grant review." *Hubbard v. United States*, ___ U.S. ___, 115 S. Ct. 1754, 1767 (1995) (Rehnquist, C.J., dissenting). This Court's Rule 10 clearly states that petitions for writ of certiorari "will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10. Petitioner fails to sufficiently demonstrate that this case is of the type contemplated by Rule 10.

[2] The principal basis upon which Petitioner relies to assert a right to obtain supervisory review by this Court is that "the District Court declared a mistrial and, at all times, adhered to

II. PETITIONER'S CITED AUTHORITIES DO NOT SUPPORT THE PETITION FOR WRIT OF CERTIORARI IN THE INSTANT CASE.

Petitioner mistakenly relies on *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988) and *American Airlines, Inc. v. Lockwood*, ___ U.S. ___, 115 S. Ct. 2274 (1995), as authority for this Court's review to "correct a substantial and serious departure by a lower court from normal federal procedure." Pet. Br. at 14. However, neither of the cases relied upon by Petitioner bears any remote similarity to the instant case.

The *Christianson* decision involved conflicting decisions between the Seventh Circuit and the Federal Circuit, where both disavowed authority to review the decision of the District Court below.[3] Such circumstances do not exist in the instant case.

---

that Declaration . . . . " Pet. Br. at 5. However, the most that can be said regarding "mistrial" is that it was considered as a possible alternative which was later abandoned in favor of acknowledging certain unanimous jury findings, while entering judgment on the basis of others. Pet. App. A 15-16. Thus, the District Court's Final Judgment was anything but "adherence" to a supposed declaration of mistrial. Rather, the Final Judgment entered clearly demonstrates a complete rejection of any notion that the jury findings were nullified or legally evaporated. Pet. App. B 2-3. In summary, any issue arising out of the alleged declaration of mistrial in the instant case is, by necessity, limited in application to the parties herein.

[3] This Court granted certiorari in *Christianson* primarily to resolve the dispute between the Court of Appeals for the Seventh and Federal Circuits. Such a split in authorities between circuit courts is a circumstance expressly referenced in Sup. Ct. R. 10.1(a) as justifying consideration by this Court. Indeed, Rule 10 provides that grant of certiorari is appropriate "[w]hen a

Petitioner also mistakenly relies on this Court's recent grant of certiorari in *American Airlines*, to review the Federal Circuit's decision in *In re Lockwood*, 50 F.3d 966 (Fed. Cir. 1995),[4] as a basis for granting its Petition. The petition in *American Airlines*, however, only raised the issue of whether there is a right to a jury trial under the Seventh Amendment of the United States Constitution when the sole claim to be tried is a claim under the declaratory judgment act to have a patent declared invalid. In contrast, the instant Petition does not even reference issues arising out of such fundamental and important constitutional concerns.[5]

III. THE DECISION BELOW IS CONSISTENT WITH APPROPRIATE JUDICIAL EXERCISE OF AUTHORITY TO PRESERVE SOUND PORTIONS OF JURY VERDICTS FOR ESTABLISHMENT OF THOSE ISSUES THAT ARE RESOLVED.

The crux of Petitioner's entire argument is that the mere utterance of the term "mistrial" by a district court

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United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter". Sup. Ct. R. 10.1(a).

[4] It should be noted that it appears *Lockwood* will not be considered by this Court since the patentee therein has sought to withdraw its jury demand and has also moved this Court to dismiss its review of the case as moot. 50 PATENT, TRADEMARK & COPYRIGHT JOURNAL (BNA), No. 1234, pp. 200-01 (June 22, 1995).

[5] That this Court granted certiorari to review *In re Lockwood* is not surprising in that the right to a jury trial is a fundamental constitutional guarantee and must be "jealously guarded by the courts." *See In re Lockwood*, 50 F.3d at 970 (citing *Jacob v. City of New York*, 315 U.S. 752, 753 (1942)).

somehow forces, without further alternative, the nullification of an entire trial. Not so. As succinctly stated by the Court of Appeals for the Federal Circuit:

> Although the district court unquestionably had the authority to declare a mistrial and order a new trial, there was no mention of a mistrial (or new trial) in the final judgment. Instead the district court disposed of the case by ruling on the parties' motions. We therefore conclude that the above-mentioned statement was merely a statement of intent post-trial of the district court, which, on more deliberate consideration, was not acted upon. *See Wahpeton Canvas Co.*, 870 F.2d at 1555 n.17, 10 USPQ2d at 1210 n.17. Accordingly, the trial judge's statement had no legal effect on the special verdict.

Pet. App. A 15. The Court of Appeals' conclusion is amply supported in the Record in the District Court.[6]

Accordingly, the District Court clearly did not declare that unanimous jury findings "legally evaporated" as asserted by Petitioner. Rather, consistent with

---

[6] The District Court, in discussing the proposed judgment with counsel, stated:

> . . . [T]he Court is of the view that the claims for invalidity that were unanimously adjudicated can be the subject of judgment, that we need to confer about what kind of judgment, if any, can be entered that would embody these rulings and essentially draw the matter to partial adjudication, if you will, so as to take the case as far as it can go with regard to this stage of the proceedings.

Resp. App. A 2. From this passage it is clear that the District Court neither believed nor intended that the jury findings or the entire trial became a nullity.

appropriate judicial exercise of authority to preserve sound jury verdicts, the Court properly gave effect to a portion of the unanimous findings of the jury by entering judgment thereon.[7] *See* Pet. App. B 2-3.

---

[7] *See Quaker City Gear Works, Inc. v. Skil Corp.*, 747 F.2d 1446, 1453 (Fed. Cir. 1984), *cert. denied*, 471 U.S. 1136 (1985) (holding that "[w]here a special verdict does not contain one or more answers requested . . . . It is 'a special verdict' to the extent findings are made . . . . ") If, as Petitioner contends, the jury findings "legally evaporated" due to the District Court's invocation of some mystical "mistrial" incantation, there would be no way for the District Court to then proceed to enter judgment on unanimous jury findings. Thus, Petitioner's claim that a mistrial was decreed erroneously mischaracterizes the District Court's Final Judgment and contradicts appropriate judicial conduct of preserving sound portions of jury verdicts.

CONCLUSION

On the basis of the foregoing points and authorities, Respondents respectfully submit that the Petition for Writ of Certiorari herein should be denied in all respects.

Respectfully submitted,

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Dated: July 17, 1995

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE ALICEMARIE H. STOTLER,
JUDGE PRESIDING

BAXTER HEALTHCARE PRODUCTS,	)	
Plaintiff,	)	
vs.	)	No. CV 89-131-AHS
SPECTRAMED, INC.,	)	
Defendant.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Santa Ana, California

Tuesday, March 2, 1993

Kathleen J. Haaland, CSR
Official Court Reporter
412 United States Courthouse
751 Santa Ana Boulevard
Santa Ana, CA 92701

March 2, 1993, Page 34, lines 15-23:

. . . [T]he Court is of the view that the claims for invalidity that were unanimously adjudicated can be the subject of judgment, that we need to confer about what kind of a judgment, if any, can be entered that would embody these rulings and essentially draw the matter to partial adjudication, if you will, so as to take the case as far as it can go with regard to this stage of the proceedings.

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(3)

No. 94-2069

Supreme Court, U.S.
FILED
AUG 14 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SPECTRAMED, INC.,
Petitioner,

vs.

BAXTER HEALTHCARE CORPORATION
and UTAH MEDICAL PRODUCTS, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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APPENDIX H

Reporter's Transcript of Proceedings, Before the United States District Court for the Central District of California, March 2, 1993, p. 34, l 1-23 . . . . . H1

No. 94-2069

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

SPECTRAMED, INC.,
Petitioner,
vs.
BAXTER HEALTHCARE CORPORATION
and UTAH MEDICAL PRODUCTS, INC.,
Respondents.

PETITIONER'S REPLY BRIEF

I.

INTRODUCTION

Respondents' Opposition entirely fails to address the question presented by the Petition herein. Rather than addressing the question presented of whether a court of appeals can nullify a declaration of a mistrial by a district court on the basis that the district court, subsequent to declaring the mistrial, ruled on post-trial motions brought by the parties, the Opposition makes only the fatally flawed argument that a mistrial never occurred. However, this argument is a denial of reality. In addition, it is based on a seriously incomplete quotation of a statement by the district court judge.

II.

THERE CAN BE NO DOUBT THAT A MISTRIAL WAS DECLARED

In addition to the statements by the District Court set forth at pages 9 and 10 of the Petition (where it is noted that the District Court first stated that it was necessary "to declare a mistrial" and discharge the jury, and then twice subsequently referred to the fact that a mistrial had been "declared", as demonstrated in Appendices D, E and F to the Petition), we note that the trial court's docket for February 19, 1993, the date of declaration of the mistrial, reads as follows:

> "913. MO: 52nd day trial. Closing arguments md by each side as to issues covered by special interrog number 9 & 11. & limits purpose. Having been permitted by the Crt notes that the special verdict dtd 2-19-93 has not been altered since it was rcvd by the Crt & sealed by the clrk 2-18-93 prior to in-Crt session for further limited argument. Polling waived: Fld Jury notes; mistrial decl: Crt & cnsl conf re pltf's prop ltd argument, which is granted. Each side argues dlib. cont. Jury note 17 rcfd. telephone conf hld as to respse by the Crt, which was faxed jury deadlock. All prtys: verdict rtnd, read: pulling [sic] waived, Crt decl mistrial, cnsl ords to rtn at 9am 2-23-93 for sched conf. Dft renews all its formal rules 50 mtns. Jury thanked dischrgd. Fld special verdict. Cnsl should stip to retention of exhts. (C/R-K/Haaland/R. Worth)." (emphasis added).

Thus, the docket entry states, in pertinent part, the following facts:

"1. Crt decl mistrial."

"2. Jury thanked dischrgd."

This docket entry is set forth in Appendix G hereto.

Thus, Respondents' argument that declaration of a mistrial did not occur is directly contrary to the indisputable record reflected to Appendices D-G.

A. Respondents' Incomplete Quotation

In footnote 6 on page 6 of Respondents' Opposition, an incomplete quotation of a statement by the District Court is set forth and Respondents' Appendix A contains the same incomplete quotation. The portion of the quotation which Respondents omitted changes the entire import of the District Court's statement which, in its complete form (with the portion omitted in Respondents' incomplete quotation underlined), reads as follows:

> "THE COURT: I need to deal with the prospect of entering a judgment, if the Court rules in accordance with the tentative ruling placed before counsel this afternoon. And that is in [sic] inclination.
>
> In order to enter a judgment, it would seemingly be compatible with the plaintiffs' suggestion to the Court, when the jury was unable to unanimously agree that

> there be a mistrial [and] that the Court enter a judgment insofar as it can do so on the claims that the Court determines have been adjudicated. And since I decline to conclude that the plaintiffs are correct that the Court should enter judgment with regard to the findings about infringement, inasmuch as there is no unanimous agreement to questions 9 and 11, but the Court is of the view that the claims for invalidity that were unanimously adjudicated can be the subject of judgment, that we need to confer about what kind of a judgment, if any, can be entered that would embody these rulings and essentially draw the matter to partial adjudication, if you will, so as to take the case as far as it can go with regard to this stage of the proceedings."

The complete quotation is appended hereto as Appendix H. The key portion of the omitted quotation is as follows:

> "And since I decline to conclude that the Plaintiffs are correct that the Court should enter judgment with regard to the findings about infringement, in as much as there is no unanimous agreement as to questions 9 and 11 . . ." (emphasis added)

Thus, Respondents' argument (page 7 of the Opposition) that the District Court "properly gave effect to a portion of the unanimous findings of the jury by entering judgment thereon" is exactly what the District Court did not do with the jury findings on infringement. This is plain

from the statement by the District Court which was omitted from Respondents' cropped quotation.

Yet, this is exactly what the Court of Appeals for the Federal Circuit did, i.e., adopt the jury's finding of infringement in spite of the mistrial and in spite of the District Court's refusal to enter judgment on these findings. This action by the Federal Circuit was a substantial departure from the accepted and usual course of judicial proceedings.

III.

THE NEED FOR EXERCISE OF THIS COURT'S POWER OF SUPERVISION

In the present case, the Federal Circuit has so far departed from the accepted and usual course of judicial proceedings that intervention by this Court, as contemplated by Rule 10.1(a) of this Court, is profoundly warranted. The court below cited no authority for its unprecedented act of refusing to give effect to the declaration of a mistrial and proceeding to do that which the District Court had expressly refused to do, namely, adopt the jury's findings on infringement. Similarly, absolutely no support is cited in Respondents' Opposition for this unprecedented act by the Federal Circuit. This is the very definition of a departure from the accepted and usual course of judicial proceedings.

If this Court does not step in and correct this situation, great mischief will result. A few examples of such mischief follow below.

1. A district court judge who declares a mistrial and is later told by an appellate court that she did not do so because she ruled on post-trial motions brought by the parties is left on remand, as here, to try to figure out what she should do next when she well knows she declared a mistrial.

2. The Federal Circuit, following its precedent in the present case, will consider itself able to ignore declarations of mistrials and make rulings as if a trial had occurred when, in fact, the declaration of a mistrial has caused the trial to be as if it had never occurred.

3. Lawyers for parties in cases in which a mistrial has been declared will experiment with numerous devices such as motions and the like in an effort to set the stage for an argument that a declaration of a mistrial should be nullified.

While mistrials are not an everyday occurrence, the large number of patent cases currently being tried to juries means that mistrials by reason of inability by the jurors to reach a unanimous result will happen in a finite number of cases which will come to the Federal Circuit for review. Guidance by this Court at this time will help the Federal Circuit discharge its appellate responsibilities in cases involving mistrials in a manner consistent with the traditional notion that a mistrial renders a trial a nullity.

As noted by Mr. Justice Stevens in *Florida v. Rodriguez*, 469 U.S. 1, 7 (1984):

> "As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation." (dissenting).

The many cases falling into this category are collected in "Supreme Court Practice", 7th Ed., Stern et al (1993), pp 192. In addition, this Court provided guidance to the Federal Circuit in *Dennison Manufacturing Co. v. Panduit Corp.*, 475 U.S. 809 (1986) where this Court, in a summary disposition, remanded to the Federal Circuit in a case in which this Court concluded that the Federal Circuit had improperly ignored Federal Rule of Civil Procedure 52(a) by substituting its view of factual issues for that of the district court. Similarly, in *Cardinal Chemical Co. v. Morton International, Inc.*, 508 U.S. ___, 124 L.Ed.2d 1, (1993) this Court vacated and remanded a Federal Circuit decision which, after affirming a district court judgment of noninfringement, vacated a district court judgment that the patent was invalid because such vacatur was held by this Court to be improper treatment by the Federal Circuit of a ruling by a District Court.

The question presented here is of precisely the same quality, i.e., it is a question of whether the Federal Circuit is employing sound procedure in dealing with a legal issue, here, the consequence of the declaration of a mistrial.

IV.

CONCLUSION

It is crucially important for the Supreme Court to intervene in this case to prevent a serious departure from the traditional, accepted and usual judicial procedure in dealing with the aftermath of a declaration of a mistrial. The grant of a Writ of Certiorari is plainly warranted.

Respectfully submitted,

DATE: August 11, 1995

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APPENDIX G

TRIAL COURT'S DOCKET FOR
FEBRUARY 19, 1993

Plaintiff:	Defendant:	Page 42
BAXTER	SPECTRAMED	

DATE	NR.	PROCEEDINGS
2/19/93	kp	913. MO: 52nd day trial. Closing arguments md by each side as to issues covered by special interrog number 9 & 11. & limits purpose. Having been permitted by the Crt notes that the special verdict dtd 2-19-93 has not been altered since it was rcvd by the Crt & sealed by the clrk 2-18-93 prior to in-Crt session for further limited argument. Polling waived: Fld Jury notes; mistrial decl: Crt & cnsl conf re pltf's prop ltd argument, which is granted. Each side argues dlib. cont. Jury note 17 rcfd. telephone conf hld as to respse by the Crt, which was faxed jury deadlock. All prtys: verdict rtnd, read: pulling [sic] waived, Crt decl mistrial, cnsl ords to rtn at 9am 2-23-93 for sched conf. Dft renews all its formal rules 50 mtns. Jury thanked dischrgd. Fld special verdict. Cnsl should stip to retention of exhts. (C/R-K/Haaland/R. Worth).

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE ALICEMARIE H. STOTLER,
JUDGE PRESIDING

BAXTER HEALTHCARE CORP, and UTAH MEDICAL PRODUCTS, INC., Plaintiffs,	) No CV 89-131AHS
v.	
SPECTRAMED, INC., Defendant.	

REPORTER'S TRANSCRIPT OF PROCEEDING
Santa Ana, California

Tuesday, March 2, 1993

Kathleen J. Haaland, CSR
Official Court Reporter
412 United States Courthouse
751 Santa Ana Boulevard
Santa Ana, CA 92701

March 2, 1993, Page 34, lines 1-23:

THE COURT: I need to deal with the prospect of entering a judgment, if the Court rules in accordance with the tentative ruling placed before counsel this afternoon. And that is in inclination.

In order to enter a judgment, it would seemingly be compatible with the plaintiffs' suggestion to the Court, when the jury was unable to unanimously agree that there be a mistrial [and] that the Court enter a judgment insofar as it can do so on the claims that the Court determines have been adjudicated. And since I decline to conclude that the plaintiffs are correct that the Court should enter judgment with regard to the findings about infringement, inasmuch as there is no unanimous agreement to questions 9 and 11, but the Court is of the view that the claims for invalidity that were unanimously adjudicated can be the subject of judgment, that we need to confer about what kind of a judgment, if any, can be entered that would embody these rulings and essentially draw the matter to partial adjudication, if you will, so as to take the case as far as it can go with regard to this stage of the proceedings.